



STATE OF WASHINGTON

DEPARTMENT OF AGRICULTURE

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This is a 5 page FAX, including this cover

To: Greg Overstreet

From: Dannie McQueen, Manager

Re: Comments on draft model rules and comments

Date: January 12, 2006

Attached you will find comments regarding the draft model rules and comments.



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DATE: January 12, 2006

TO: Greg Overstreet
Office of the Attorney General

FROM: Dannie McQueen, Manager
Administrative Regulations Program

RE: Comments on draft model rules and comments

I have had the opportunity to review the proposed model rules and guidelines and am providing the following comments based upon my 25 + years of experience in this field. I have listened to the various debates and have reviewed the outcome of many lawsuits regarding this matter, and I understand there are varying perspectives to be had on the subject. My perspective, as you review the following feedback, comes from a state agency employee perspective whose agency fulfills numerous public disclosure requests even though the workload is tackled "as other duties as required."

1. WAC 44-14-00002 Format of model rules

I recommend that the comments of the model rules (formatted with five-digit WAC number) be removed from the model rules and use the text, instead, to do an educational document; one for requesters and one as a reference manual for agency staff.

2. WAC 44-14-00003 Model rules and comments are nonbinding

Even though it states that the comments in the model rules are non-binding, requesters will (and have already begun) to misinterpret their content and are attempting to hold the agency to what is suggested in them. It must be recognized that if the Attorney General of the State of Washington is making a recommendation, that recommendation will carry weight whether or not it is stated that it is not binding. In addition, the courts may also look at the document for guidance.



3. WAC 44-14-00005 Training is critical

In the past, public disclosure training has been provided to attorneys (both public and private) via CLEs. What would be beneficial and what is recommended, since state agencies are clients of the Attorney General's Office (AGO), is the AGO provide public disclosure training to state agency staff. Part of the comments of the model rules developed could be incorporated into a desk manual (reference 1 above).

It may be that the Bar Association might partner with the AGO in the development of the twenty-two chapter desk book on public records in 2006 (reference WAC 44-14-00006).

Conducting this training might relieve current assistant attorneys general from having to review agency staff work in this regard as well.

4. WAC 44-14-03003 Index of records

Remove the language in WAC 44-14-03003 "However, technology allows agencies to map out, archive, and then electronically search..." Depending upon the size, resources, technology and ability of the agency and its staff, I believe many agencies are not prepared to map out, archive and electronically search documents and still must rely on the paper methodology. The ability to upgrade technology is dependent upon the legislature providing funds to agencies to make such advances in technology. That funding is not often available.

5. WAC 44-14-03005 Retention of records

I recommend the removal of references to timeframes to either keep or delete records. I.e., "For example, documents with no value such as internal meeting scheduling e-mails can be destroyed instantly..." Instead, refer to the applicable records retention schedule.

6. WAC 44-14-04003 Responsibilities of agencies in processing requests.

- A. I recommend the removal of the that editorial language "A relatively simple request need not wait for a long period of time while a much larger request is being filled."

The agency/person fulfilling the request has a duty to determine the reasonable timeframe to respond to a request, at a minimum, for two reasons. (1) The public will always believe that their request is easy to attend to. They do not realize that agency staff are obligated to perform the same thorough review up to and including redaction for inspection of records as with copying records.

(2) Some agencies do not have any full-time records officers or custodians. At times, to remain fair to all requesters and to allow agency staff to get other work completed, a request is filled on a first-come, first-serve basis.

- B. I recommend the removal of the editorial language, "Routine extensions with little or no action to fulfill the request would show that the previous estimates were not "reasonable."

Each public disclosure situation should be based upon its own merit and approach. Agencies without dedicated public records staff may have pressing agency business (such as responding to an emergency) that prevents them from completing a response to a records request as soon as originally expected. Such a situation does not mean the extension is unreasonable or that an agency is acting in bad faith. Ultimately, it is up to the court to determine whether an agency was reasonable in its response to a request.

- C. I recommend the removal of editorial language, "An estimate can be revised, when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records."

It is understood that the comments and model rules are not binding, however, because the AGO would potentially be publishing them, they would be considered to have the weight of the AGO. Therefore, no editorial language should be added regarding denials other than what is provided in statute. Again, the courts would determine if denial under these circumstances did, indeed, occur.

- D. Same section under "Seek clarification of a request or additional time." An alternative to "If the agency considers the request abandoned, it should send a closing letter to the requestor." would be a sentence added to the letter stating when the records will be available, and then **"If the Department does not hear back from you by _____, it will consider this request closed and the documents will be re-filed."**

For efficiency and closure, by pre-stating a deadline and what will occur upfront, it eliminates the need for agency staff to have monitor the timeframe and potentially go back and work on a request again.

7. WAC 44-14-05004 Responsibilities of agency in providing records

In some type of educational document, you should explain to requestors that the same work goes into preparing records for a review/inspection as the work involved for copying and disclosing documents. As you know, there are some mandated exemptions to disclosure that must be addressed, which means agency staff must review and redact prior to any type of release of information. Educating the public, in most instances, is key to successful disclosure efforts.

Explain that installments of records are an option for an agency, and it is not a mandatory approach.

Under (4) Failure to provide records.” Remove the language that “A denial” of a request can occur when an agency “Does not have a record.” Again, the courts would be the final determiner of a denial.

(5) Under Notifying requestor that records are available, see D under 6 above.

8. WAC 434-24-06002 Summary of Exemptions

Under (3) Attorney-client privilege. Remove the language “It does not exempt records merely because they reflect communications in meetings where legal counsel was present...” This may be misleading to a person reading this comment. There are times when agency management schedules meetings with their assigned AAG for the purpose of seeking legal advice. In this instance, the attorney-client privilege could be invoked for any documents produced in the meeting. In addition, if an agency claims Attorney-Client Privilege, it is up to a court to determine whether the exemption was utilized appropriately.

In summary, leaving the comments in the model rules may ultimately be misleading to the public about an agency’s statutory requirements under the Public Records Law. I realize putting this proposal together and conducting public forums is quite a positive undertaking. I would be happy to assist in anyway to put the finishing touches on the proposal. While reading through other testimony already submitted regarding this proposal, one suggestion was to put together a group to help finalize the rules. I would be happy to work on such an endeavor with you.